UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WILLIAM G. GRADY, ADMINISTRATOR,	:	
Plaintiff,	:	
SHIRLEY JAKABOSKI,	:	
Intervenor-Plaintiff	:	CASE NO. 3:96CV00214 (RNC)
V.	:	
TOWN and CITY OF MIDDLETOWN, JAMES PARKER, LOUIS TOSTO, and JOHN LATERRA,	:	
Defendants.	:	

RULING AND ORDER

Plaintiff Grady brings this action in this capacity as administrator of the Estate of Alex Jakaboski against the City of Middletown and three Middletown police officers pursuant to 42 U.S.C. § 1983. Plaintiff claims that Officer Parker shot and killed Jakaboski in violation of the Fourth Amendment and that Officers Tosto and Laterra are liable for Parker's use of force because they had a reasonable opportunity to prevent it. Plaintiff also pleads state law claims of negligence against the officers and an indemnification claim against the City pursuant to Conn. Gen. Stat. § 7-465. The mother of the decedent, Shirley Jakaboski, has intervened to allege state law claims of negligence against the officers. Defendants have moved for summary judgment on the § 1983 claim contending that Officer Parker's use of deadly force was objectively reasonable under the

Fourth Amendment and that the officers are entitled to qualified immunity. I agree that the officers are entitled to summary judgment on the § 1983 claims and dismiss the pendent state law claims.[1]

I. Facts

The following facts are essentially undisputed. On November 27, 1994, Shirley Jakaboski called the Middletown Police Department from a friend's house to complain about her son's behavior. She reported that he had hit her, knocked over a bureau, and put a hole in the wall. *See* Middletown Police Tape Transcript, Ex. A to Defs.' Brief, Addendum at 2. She told the dispatcher that there was a BB gun and a bow in the house and a rifle she was planning to give her son as a gift. She made no mention of any handguns. *See id.* at 2-3. Mrs. Jakaboski stated that she wanted a police officer to tell her son not to hit his mother and to go to counseling. *See id.* at 3.

The defendant officers were dispatched to the Jakaboski condominium. Alex Jakaboski, a 17 year old male, opened the door but refused to allow the officers to enter. After some delay, Mrs. Jakaboski arrived and let the officers in. Six people were present: Mrs. Jakaboski, her friend Dori Beck, Alex, and the three officers. Mrs. Jakaboski told the officers about her problems with Alex but did not disclose that he might be armed with a handgun.

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[1] Plaintiffs' amended complaint alleges civil rights claims under § 1983 against "all defendants" but fails to include allegations adequate to state a § 1983 claim against the City. Accordingly, to the extent plaintiff has attempted to allege a § 1983 claim against the City, that claim is also dismissed.

The officers viewed the damage to the condominium, which tended to corroborate Mrs. Jakaboski's complaint, and decided to arrest Alex pursuant to Connecticut's Family Violence laws, which mandate an arrest in certain circumstances.[2]

Parker told Alex to put down a soda can he was holding. The officers then told him to turn around so they could handcuff him. Alex extended his arms, stiffened, resisted the officers' attempts to handcuff him, and began to struggle. According to Mrs. Beck, the officers had trouble restraining Alex. *See* Beck Dep., Ex. L to Defs.' Brief, at 97-98. Eventually, the officers brought Alex to the floor on his stomach with his arms and hands beneath him. Laterra handcuffed Alex's left wrist. The other officers tried but were unable to handcuff his right wrist because he refused to move his right arm, which remained beneath him.

The parties dispute what happened next. Defendants have testified that they began to roll Alex on his side so they could handcuff his right wrist. As they did so, Tosto realized Alex had a gun and yelled either "gun" or "46," the code word for weapon. They rolled Alex back onto his stomach as a protective measure and ordered him to release the gun but he refused. As the struggle continued, Alex's gun went off twice, both times at an upward angle. One bullet went through Parker's boot, although he was

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[2] Conn. Gen. Stat. § 46b-38b(a) provides: "Whenever a peace officer determines upon speedy information that a family violence crime . . . has been committed, . . . he shall arrest the person or persons suspected of its commission and charge such person or persons with the appropriate crime."

not aware of it at the time, and the other went through Alex's thigh. Both bullets lodged in nearby walls, and smoke from the gun came up between Parker and Laterra. Laterra jumped up to move away from Alex. According to Parker and Laterra, Alex was beginning to move forward as if to get up. *See* Parker's Statement, Ex. C to Defs.' Brief, at 5; Laterra Dep., Ex. I to Defs.' Brief, at 72.[3] Immediately after Alex's gun discharged, Parker fired two shots into the back of Alex's head, killing him. When Alex's body was turned over, he was found to be wearing a shoulder holster under his jacket and holding a Norinco .45 caliber handgun in his right hand.[4] Three magazines of bullets were found in his back pocket, each containing seven .45 caliber rounds.

Plaintiffs concede that Alex struggled with the officers on the floor, that a handgun was found under his body, and that the gun discharged twice as a result of the struggle. However, they contend that Parker fired first and that Alex's gun discharged reflexively after he was shot. Plaintiffs also contend that Alex was so firmly pinned by the officers before he was shot that no reasonable officer could have believed that deadly force was necessary to prevent him from shooting others in the room.

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[3] This point is disputed by plaintiffs, who note that the State Police Forensic Laboratory Report states that "[the] bloodstain pattern would indicate that Mr. Jakaboski's head was very near to, if not in contact with the floor when at least one of the projectiles impacted the back of his head." State Police Forensic Laboratory Report, Ex. 7 to Pls.' First Statement of Material Facts, at 2.

[4] The handgun was owned by Mrs. Jakaboski.

II. Discussion

Under Fed. R. Civ. P. 56(c), summary judgment is proper if there is no genuine issue of material fact for a jury to resolve and the moving party is entitled to judgment as a matter of law. A factual dispute is material if it bears on an essential element of the plaintiff's claim; a factual dispute is genuine if a reasonable jury could resolve it in favor of the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

On a motion for summary judgment, "the judge's function is not to himself weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. In making this determination, the evidence must be viewed fully and in a manner most favorable to the nonmoving party, giving it the benefit of all reasonable inferences and resolving all doubts in its favor.

In opposing summary judgment, a party "must do more than simply show that there is some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Rather, it must "offer some hard evidence showing that its version of the events is not wholly fanciful." *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998). The evidence must be sufficient to enable "a rational trier of fact to find for the non-moving party." *Matsushita Electric Indus. Co.*, 475 U.S. at 587. "[C]onclusory allegations, conjectur, and speculation . . . are insufficient to create a genuine issue of fact." *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir.

1998), *see also Podell v. Citicorp Diners Club*, 112 F.3d 98, 100 (2d Cir. 1997).[5]

Excessive Force Claim Against Officer Parker

The excessive force claim against officer Parker is governed by the Fourth Amendment's standard of objective reasonableness. *See Graham v. Connor*, 490 U.S. 386, 397 (1989).[6] A police officer's use of deadly force is reasonable only when "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).[7] The reasonableness of a use of force must be examined from "the perspective of a

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[5] At one time, summary judgment was denied even though a plaintiff's story was "improbable," *see Arnstein v. Porter*, 154 F.2d 464, 469 (2d Cir. 1946), but that approach has been abandoned. *See Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1258 n.4 (2d Cir. 1986); *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319 (2d Cir. 1975); *Beal v. Lindsay*, 468 F.2d 287, 291 (2d Cir. 1972).

[6] "Reasonableness under the Fourth Amendment resembles tort law in its attention to how a specific, concrete circumstance should affect an officer's judgment [and] [t]his heightened sensitivity to context suggests that reasonableness under the Fourth Amendment should frequently remain a question for the jury." *Abraham v. Raso*, 183 F.3d 279, 289-90 (3rd Cir. 1999). However, "even though reasonableness traditionally is a question of fact for the jury, defendants can still win on summary judgment if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the circumstances." *Scott v. Heinrich*, 39 F.3d 912, 915 (9th Cir. 1994) (internal citations omitted).

[7] Conn. Gen. Stat. § 53a-22(c), while not determinative of the Fourth Amendment issue, provides that a police officer "is justified in using deadly physical force upon another person . . . only when he reasonably believes such to be necessary to: (1) Defend himself or a third person from the use or imminent use of deadly physical force. . . ."

reasonable officer on the scene, rather than with the 20/20 vision of hindsight," *Graham*, 490 U.S. at 396, taking into account all the relevant facts and circumstances, including "the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he [was] actively resisting arrest or attempting to evade arrest by flight." *Id.* at at 396.[8]

Defendants contend that at the moment Officer Parker fired his weapon, Alex was resisting arrest and refusing to give up a gun that had just discharged twice. On their version, Officer Parker shot Alex in order to prevent serious injury or death to others in the room. If their account of the events is accurate, Alex did pose an immediate danger and no reasonable juror could find that Officer Parker's decision to use deadly force was unlawful. Accordingly, the issue is whether there is a genuine dispute that Alex posed an immediate danger as claimed by the officers.

Plaintiffs contend that a jury could hold Officer Parker liable for excessive force on the ground that Alex's gun did not discharge until after he had been shot by Officer Parker. Defendants do not accept the premise that it is objectively unreasonable to use deadly force in a situation like this unless and until the individual engaged in life threatening behavior actually fires his gun.

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[8] Under the Fourth Amendment, the reasonableness of the officers' actions leading to Officer Parker's use of deadly force is not in issue. *See Salim*, 93 F.3d at 92. Thus, the only relevant question under the Fourth Amendment is whether, at the moment Officer Parker fired his weapon, he had reason to perceive that he and the others in the room were in imminent danger.

However, even assuming that the officers were not entitled to use deadly force until Alex's gun discharged, the record establishes that Alex's gun discharged before he was shot. Plaintiffs have formally admitted that "[o]ne-half to one second lapsed between the time Mr. Jakaboski's gun discharged and defendant, Parker, shot Mr. Jakaboski twice." Joint Pls.' Statement of Material Facts Which Are Not In Dispute, ¶ 11. [Doc. #46, at 9]. They now take a position at odds with that admission. However, the evidentiary support for it remains overwhelming.[9]

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[9] In addition to the officers' testimony and the physical evidence gathered by the State in its investigation of the shooting, the record contains the following statements by Mrs. Jakoboski [sic] and Mrs. Beck:

> "While struggling to pull his right hand out, I heard a gun discharge. Not more than two seconds later, Officer Parker fired two shots into the back of my son's head from a distance of not more than six inches." Shirley Jakaboski Media Statement, Ex. B to Defs.' Supp. Brief, at 3.
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> "One of the officers was holding a gun a short distance from the back of Alex's head before I heard a shot go off. I saw Alex's face as his eyes widened, then I heard and saw the officer's gun go off shooting Alex in the back of the head twice." Shirley Jakaboski Statement, Ex. B to Defs.' Supp. Brief, at 7.
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> "The next thing I heard was a shot. A brief pause and then two more shots." Beck Statement, Ex. C to Defs.' Supp. Brief, at 3.
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> "It seems to me that after the first shot I looked, turned toward him (Alex). I think I saw the policeman shoot him (Alex) twice, it feels that the policeman's shots were toward the head." Addendum to Beck Statement, Ex. B to Defs.' Supp. Brief.
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> "Q: You heard a loud noise, did you know where that loud noise came from?

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Plaintiffs also contend that a jury could find in their favor on the ground that Alex was so firmly pinned to the floor that he could not shoot anyone but himself. As defendants point out, plaintiff's position on this issue is refuted by physical evidence. *See* Defs.' Mem. In Supp. of Supplemental Not. For Summ. J. at 3-6 [doc. #57]. It is undisputed that of the two bullets discharged from Alex's weapon while he was on the floor, pinned by the officers, one lodged in a wall at three feet, ten inches from the floor (chest height), *see* State Police Forensic Laboratory Report, Ex. B to Defs.' Brief, at 18, and one went through Parker's boot. *See id.* at 12-13; Report of Chief State's Attorney, Ex. A to Defs.' Brief, at 33, 35. Given this evidence, no reasonable juror could find that Alex's position on the floor prevented him from shooting others.[10]

A: I looked back and it looked like it was coming from where they were. It sounded like –

Q: You didn't know where it came from, correct?

A: No.

Q: What happened when you looked back?

A: The officer was shooting Alex.

Q: Well, did you see him draw his gun?

A: No.

Q: What did you see?

A: The gun is by Alex's head and bang bang. I couldn't believe it."

Beck Dep., Ex. 10 to Pls.' First Statement of Material Facts, at 50.

[10] Plaintiffs emphasize that Officer Parker did not know where the bullets went until after he shot Alex. Assuming that to be true, his inability to know where the bullets went did not make it objectively unreasonable for him to believe that Alex posed an immediate danger.

In cases arising from fatal police shootings, the circumstantial evidence must be scrutinized to see if it is consistent or inconsistent with the officers' account. Here, the circumstantial evidence supports the officers' version.[11]

Excessive Force Claim Against Defendants Tosto and Laterra

The amended complaint alleges that Officers Tosto and Laterra inflicted deadly force on Alex but there is no evidence to that effect. Plaintiffs also allege that Officers Tosto and Laterra should have intervened to prevent Officer Parker from shooting Alex. However, the force used by Officer Parker was not unlawful. Accordingly, Officers Tosto and Laterra are entitled to summary judgment on the excessive force claims against them.

Qualified Immunity

Defendants contend that even if Officer Parker's use of force could be determined to be unlawful, they are nevertheless entitled to qualified immunity, which shields government officials from liability for damages as a result

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[11] *See* Report of Chief State's Attorney, Ex. A to Decl.' Mem. In support of Summ. J. at 33 [doc. #35] ("Defs.' Mem."). The State Police Forensic Science Laboratory concluded that, "[b]ased on the study of the crime scene photographs and the physical evidence, the shooting scene is consistent with the statements and descriptions of the Middletown police officers." State Police Forensic Laboratory Report, Ex. B to Defs.' Mem. at 20. Both the Chief's State's Attorney's and the Middletown Police Department Firearms Review Board found that Officer Parker's use of force were [sic] justified. *See* Report of the Chief State's Attorney, Ex. A to Defs.' Mem. at 51; Report of Middletown Police Department Firearms Review Board, Ex. H to Defs.' Mem.

of the performance of discretionary duties. *See Harlow v. Fitzgerald*, 457 U.S. 817-18 (1982). I agree.

"A qualified immunity defense is established if (a) the defendants' action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate the law." *Salim*, 93 F.3d at 89. "In this instance, the question for the purposes of qualified immunity is whether a reasonable officer could have believed that the use of force alleged was objectively reasonable in light of the circumstances." *Lennon v. Miller*, 66 F.3d 416, 425 (2d Cir. 1995). This test is satisfied if "officers of reasonable competence could disagree on the legality of the defendants' actions." *See Salim*, 93 F.3d at 91 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "Thus, if the court determines that the only conclusion a rational jury could reach is that reasonable officers would disagree about the legality of the defendants' conduct under the circumstances, summary judgment for the officers is appropriate." *Lennon*, 66 F.3d at 421.

Qualified immunity serves to protect police from liability and suit when they are required to make on-the-spot judgments in tense circumstances. In this case, the record establishes as a matter of law that Officer Parker used deadly force after Alex's gun discharged in close proximity to the officers. No rational jury could find that his decision to use deadly force was "so flawed that no reasonable officer would have made the same choice." *Lennon*, 66 F.3d at 425.[12] Accordingly, the defendants are

[12] "No court or jury in a reported case has found fault with an officer's use of deadly force to defend himself or another person from an imminent threat with a deadly weapon." William A. Geller and Michael

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entitled to summary judgment based on qualified immunity.

III. Conclusion

For the forgoing reasons, defendants' motion for summary judgment is granted. Because the federal claims have been dismissed, the pendent state law claims must also be dismissed. *See Salim,* 93 F.3d at 92.

So ordered.

Dated at Hartford, Connecticut this 29th day of March 2001.

/s/ Robert N. Chatigny
Robert N. Chatigny
United States
District Judge

Scott, *Deadly Force: What We Know,* Washington, D.C., Police Exec. Res. Forum, 1992.